No. 14-116

IN THE

Supreme Court of the United States

LOUIS B. BULLARD,

Petitioner,

v.

BLUE HILLS BANK,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS AND PUBLIC CITIZEN, INC. AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Consumer Bankruptcy Attorneys, or NACBA, is a non-profit organization of more than 3,000 consumer bankruptcy attorneys practicing throughout the country. NACBA is dedicated to protecting the integrity of the bankruptcy system and preserving the rights of consumer bankruptcy debtors, and to those ends it provides assistance to consumer debtors and their counsel in cases likely to impact consumer bankruptcy law. In particular, NACBA submits *amicus curiae* briefs when in its view resolution of a particular case may affect consumer debtors throughout the country, so that the larger legal effects of courts' decisions will not depend solely on the parties directly involved in the case. NACBA also strives to influence the national conversation on bankruptcy laws and debtors' rights by increasing public awareness of and media attention to the important issues involved in bankruptcy proceedings.

Public Citizen, Inc., a consumer-advocacy organization founded in 1971, appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and courts on a wide range of issues and works for enactment and enforcement of laws protecting consumers, workers, and the general public. Public Citizen often repre-

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than amici curiae, their members, and their counsel made any monetary contribution toward the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters of consent accompany the brief.

sents the interests of its members in litigation, including through *amicus curiae* briefs. Protection of the rights of consumer litigants, such as the Chapter 13 debtors whose procedural rights are at issue in this case, has long been an important interest of Public Citizen.

The issue in this case—whether consumer debtors in bankruptcy proceedings may appeal from denials of plan confirmation—directly implicates the interests of the consumers whose rights Public Citizen and NACBA support. Denying debtors the right to appeal from the denial of plan confirmation would unfairly disadvantage debtors relative to creditors, who are able to appeal adverse determinations with respect to plan confirmation. Recognizing that denials of plan confirmation are appealable as a matter of right will remove unnecessary obstacles to the expeditious determination of the rights of debtors and creditors alike.

SUMMARY OF ARGUMENT

For a debtor in a Chapter 13 bankruptcy case, the bankruptcy court's grant or denial of confirmation of the debtor's payment plan is the pivotal event of the case. The grant of confirmation allows the debtor to proceed with payments under the plan, leading, eventually, to discharge. Denial of confirmation, by contrast, reflects the bankruptcy court's definitive rejection of the debtor's plan, and requires the debtor to start over again with proceedings aimed at confirmation of a different plan, or to abandon Chapter 13 altogether and either dismiss or accept dismissal of the case or convert it to a Chapter 7 case.

The consequences of a confirmation determination, one way or another, readily satisfy this Court's definition of an appealable, final order in a bankruptcy proceeding under 28 U.S.C. § 158: The confirmation decision "finally dispose[s] of a *discrete dispute[] within the larger case*." *Howard Deliv. Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 657 n.3 (2006) (citation omitted). Section 158's text and history support a flexible construction allowing appeals of orders that definitively resolve matters within a bankruptcy case before its final termination in discharge or dismissal, and this Court accordingly has held that orders granting confirmation must be treated as appealable final judgments. *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 269 (2010). Denial of confirmation is no less final within the meaning of section 158.

Allowing creditors to appeal confirmation orders while denying debtors the right to appeal the denial of confirmation would systematically disadvantage one set of parties to bankruptcy cases without achieving any significant policy benefits. Such an unprincipled distinction would serve only to impede appellate resolution of the many unsettled issues of law that permeate bankruptcy proceedings. Moreover, alternative routes to appellate review of confirmation denials pose severe practical and financial difficulties for debtors by requiring them either to engage in unnecessary activities in the bankruptcy court aimed at confirmation of an unwanted, alternative plan, or to expose themselves to financial peril as the result of dismissal of their cases. Debtors whose meager resources are already strained enough by the expenses of Chapter 13 proceedings should not be required to face these additional obstacles in

order to obtain review of a possibly erroneous final dismissal of the plan they want confirmed.

Recognizing the appealability of confirmation denials would allow appeals of important issues affecting bankruptcy matters without exposing the appellate courts to an overload of cases. Bankruptcy appeals form a disproportionately small part of the caseload of the federal district courts and courts of appeals because of the reality that even absent artificial procedural barriers to appeal, debtors and their attorneys can afford to appeal only the most important and consequential issues. That will remain true even when denials of confirmation are properly recognized as appealable orders.

ARGUMENT

I. Failing To Treat Denials of Confirmation as Final Orders Systematically Disadvantages Debtors.

A. Plan Confirmation Is The Most Critical Step In The Chapter 13 Process.

Chapter 13 enables debtors with regular income to keep their assets, while pledging future earnings to the payment of creditors. A Chapter 13 case is commenced by filing a voluntary petition for relief. 11 U.S.C. § 301. The Bankruptcy Code does not permit involuntary Chapter 13 cases. 11 U.S.C. § 303. Within fourteen days after filing the petition, the debtor must propose a repayment plan, and only the debtor may propose a plan. 11 U.S.C. § 1321; Fed. R. Bankr. P. 3015(b). The plan details the amount the debtor will pay, how long the debtor will pay (usually

three to five years), and what creditors can expect to receive.

The Bankruptcy Code sets forth both mandatory and permissive plan provisions, 11 U.S.C. §§ 1322(a), 1322(b), 1325(a), and requires that a plan be confirmed by the bankruptcy court to become effective. 11 U.S.C. §§ 1325, 1327. Plan confirmation proceedings are "core proceedings" within a bankruptcy case. 28 U.S.C. § 157(b)(2)(L). Trustees and creditors have an opportunity to object to plan confirmation if they determine the proposed plan does not satisfy the required elements. 11 U.S.C. § 1324(a); Fed. R. Bankr. P. 3015(f). An objection to confirmation initiates a "contested matter" that is governed by Rule 9014 of the Federal Rules of Bankruptcy Procedure. *Id.* If no timely objection is received "the court may determine that the plan had been proposed in good faith and not by any means forbidden by law without receiving evidence on such issues." *Id.* Notwithstanding an objection, if the plan satisfies the mandatory conditions of the Bankruptcy Code, it must be confirmed by the bankruptcy court. 11 U.S.C. § 1325(a) ("the court shall confirm a plan if" it satisfies the listed conditions).

Once confirmed, the plan establishes the legal relationship between the debtor and creditors for the remainder of the case and beyond, unless it is modified or revoked, 11 U.S.C. §§ 1327, 1329, 1330, or subject to a proper motion for relief from judgment under Federal Rule of Civil Procedure 60(b). *Espinosa*, 559 U.S. at 269-76. When the plan is completed, the debtor obtains a discharge of all debts provided for by the plan, with limited exceptions,

which marks the end of the bankruptcy case. 11 U.S.C. § 1328.

A bankruptcy court must deny confirmation if it determines that a plan does not comply with the Bankruptcy Code, is proposed in bad faith or violation of law, provides insufficient payments to unsecured creditors, violates rights of secured creditors, or cannot be performed by the debtor. *See* 11 U.S.C. § 1325. Denial of confirmation ends the matter with respect to the debtor's proposed plan and precludes implementation of the plan. A debtor wishing to continue a Chapter 13 case in such circumstances must propose a different plan, initiating a new confirmation process.

In many instances, however, denial of confirmation will render it impossible or impractical to devise a confirmable plan that the debtor can perform. Absent a confirmed plan, the Chapter 13 case fails, and the debtor or the court either dismisses the case or converts it to one under Chapter 7. 11 U.S.C. § 1307. Under Chapter 7, debtors' non-exempt assets are liquidated and the proceeds distributed to creditors according to priorities set forth in the Bankruptcy Code. 11 U.S.C. §§ 704, 726. In the vast majority of consumer Chapter 7 cases, no substantial assets are available to be sold, and unsecured creditors receive nothing. Debtors and creditors thus both lose the benefits of Chapter 13 when a case is converted to Chapter 7, but at least the liquidation process provides an orderly means of prioritizing and discharging debts.

By contrast, if a Chapter 13 case is dismissed rather than converted, the automatic stay that protects

debtors' assets is terminated, and creditors are free to rush to the courthouse to grab whatever is available. 11 U.S.C. § 362(c); *see Dean v. Trans World Airlines, Inc.*, 72 F.3d 754, 755-56 (9th Cir. 1995) (the automatic stay "assures creditors that the debtor's other creditors are not racing to various courthouses to pursue independent remedies to drain the debtor's assets").

Decisions whether to confirm a plan or deny confirmation thus lie at the heart of Chapter 13 bankruptcy cases, and the legal and factual determinations on which confirmation turns effectively control whether a Chapter 13 bankruptcy will succeed or fail.

B. The Statutory Text Readily Accommodates Appeals From Denials of Plan Confirmation.

Given the role of confirmation determinations in the Chapter 13 process, both orders granting confirmation and orders denying it fall comfortably within the statutory authorization for appeals from final orders in bankruptcy proceedings. Nothing in the text of the statutory provisions establishing appellate jurisdiction in bankruptcy proceedings compels this Court to adopt a rigid final judgment principle limiting appeals to decrees that mark the complete termination of a bankruptcy case. Not only the language, but also the history, of the bankruptcy appeal provisions differs significantly from that of 28 U.S.C. § 1291, the generic grant of appellate jurisdiction over "final decisions" of district courts, which this Court has for the most part (but not invariably) limited to decisions that "end[] the litigation on the merits and leave[] nothing for the court to do but execute

the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945).

Section 1291's grant of jurisdiction over "final decisions" evolved from earlier statutory jurisdictional grants dating back to the Judiciary Act of 1789 specifying "final judgments and decrees." 15A Wright, Miller, *et al.*, *Federal Practice & Procedure* § 3906 (2d ed. updated 2014). Consistent with the meaning of their terms, the courts had consistently read those earlier jurisdictional grants to apply to final terminations of cases. *See, e.g.*, *The Palmyra*, 25 U.S. 502, 504 (1825). This history, and the absence of reason to believe that Congress intended to change long-settled principles of appellate jurisdiction, led this Court to conclude that the replacement of the words "judgments and decrees" with "decisions" did not change the statutory meaning: "The words 'final decision in the District Court' mean the same thing as 'final judgments and decrees,' as used in former acts regulating appellate jurisdiction." *In re Tiffany*, 252 U.S. 32, 36 (1920); *see also Crawford v. Haller*, 111 U.S. 796 (1884); *cf. McLish v. Roff*, 141 U.S. 661, 665 (1891) (construing jurisdictional grant "within the meaning of those terms as used in all prior acts of congress relating to the appellate powers of this court, and in the long-standing rules of practice and procedure in the federal courts"). Congress's decades of acceptance of that construction support this Court's interpretation of § 1291 as generally embodying a "firm final judgment rule," *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 432 (2007), even if the words "final decisions" on their face could be read more broadly.

The bankruptcy appellate provisions in 28 U.S.C. § 158, by contrast, use different words that must be read against a different historical context reflecting distinct policies applicable in bankruptcy matters. Bankruptcy appellate jurisdiction, when it emerged near the turn of the nineteenth century, permitted appeals as of right not only from final decrees in "controversies in bankruptcy," but also from non-final orders in "proceedings in bankruptcy." 16 Wright, Miller, *et al.*, *Federal Practice & Procedure* § 3926.1 (3d ed. updated 2014). The broader scope historically accorded appeals of right in bankruptcy matters reflects the common-sense proposition that awaiting the final conclusion of a bankruptcy case—discharge—to appeal critical legal determinations that resolve the distinct procedural steps of a bankruptcy would render appeals useless in many cases, because of the impossibility of unwinding the consequences of actions taken before discharge.

Against the historical backdrop recognizing the need for a considerably broader scope for appeals of right in bankruptcy cases, the current statute's language allows ample room for a more flexible construction than courts have given section 1291. In particular, the statute's continued authorization of appeals not only in bankruptcy "cases" but also bankruptcy "proceedings," 28 U.S.C. §§ 158(a) & (d)—a term that encompasses subdivisions of a broader bankruptcy case including proceedings for "confirmations of plans," 28 U.S.C. § 157(b)(2)(L)—indicates that appeals may be available at multiple stages of a bankruptcy case. Likewise, the statute's authorization of appeals not only from "decisions," "judgments," and "decrees," but from "orders" as well, suggests a broader application.

Section 158 does, of course, require that the orders in bankruptcy proceedings that are appealable as a matter of right must be "final." 28 U.S.C. §§ 158(a)(1) & (d)(1). But even under section 1291, the term "final" in itself does not limit appealability to judgments that end litigation completely. Rather, this Court has held that section 1291's requirement of finality is fully consistent with Federal Rule of Civil Procedure 54(b), which defines certain orders as "final" under section 1291 even though they do not end a case as to all claims or all parties. *See Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427 (1956) (Rule 54(b) "scrupulously recognizes the statutory requirement of a 'final decision' under § 1291 as a basic requirement for an appeal" and "merely administers that requirement in a practical manner."). Likewise, the Court's "collateral order" doctrine recognizes that some orders of district courts that do not terminate litigation are nonetheless "final" and appealable under section 1291. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

The Court's decisions suggest that an essential function of the word "final" in these statutes is to specify orders or decisions that *definitively resolve the matters they address*. To be "final" in this sense, an order "must 'conclusively determine the disputed question.'" *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). Beyond that, the history, policies and longstanding judicial constructions of particular jurisdictional grants (for example, 28 U.S.C. §§ 1291 and 1257) may impose more stringent limits, but the word "final" in itself is consistent with jurisdiction over definitive lower-court resolutions of components as opposed to the entirety of cases.

This view of finality is reflected in this Court's endorsement of a flexible approach to appealability under 28 U.S.C. § 158, which recognizes that "Congress has long provided that orders in bankruptcy cases may be immediately appealed if they finally dispose of *discrete disputes within the larger case*." *Howard Deliv. Serv.*, 547 U.S. at 657 n.3 (quoting *In re Saco Local Dev. Corp.*, 711 F.2d 441, 444 (1st Cir. 1983) (Breyer, J.)). A bankruptcy court's denial of plan confirmation under Chapter 13 on the ground that a feature of the plan is legally impermissible under the Bankruptcy Code readily meets this definition. Whether a particular proposed plan is subject to confirmation is a particular and distinct dispute that is part of the larger bankruptcy case. Moreover, a determination to confirm a plan, or not, based on resolution of the legal issue of whether a central feature of the plan is permissible or prohibited finally disposes of that discrete dispute.

Unsurprisingly, therefore, this Court held in *Espinosa* that a bankruptcy court order confirming a proposed plan "was a final judgment" subject to appeal and hence was binding on a party that failed to appeal it unless the standards of Federal Rule of Civil Procedure 60(b) for relief from judgment were met. 559 U.S. at 269.[2] The same reasoning applies to

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[2] *Espinosa* did not directly concern jurisdiction over an appeal from a confirmation order, but the Court's holding—that the party that had failed to appeal and subsequently sought to challenge the confirmation award could not prevail because it did not make the showing required for relief from a judgment under Rule 60(b)—was premised on the Court's determination that the confirmation award was a final and immediately ap-

a denial of confirmation on the ground that the plan is legally impermissible: No less than an order confirming the plan, such an order definitively disposes of the discrete dispute over whether to confirm the debtor's plan.

C. Appeals Related To Plan Confirmation Generally Resolve Unsettled Questions And Promote Uniformity.

Allowing appeals as a matter of right from decisions concerning plan confirmation not only is consistent with the statutory text, but also serves the important function of promoting the resolution of legal issues critical to the functioning of the bankruptcy system. Despite Congress's authority to establish "uniform Laws on the subject of Bankruptcies throughout the United States," U.S. Const., art. I, sec. 8, cl.4, in practice, the law governing Chapter 13 bankruptcies varies significantly from state to state, from district to district, and sometimes even from judge to judge within districts. *See* Daniel A. Austin, *State Laws, Court Splits, Local Practice Make Consumer Bankruptcy Anything but "Uniform,"* Am. Bankr. Inst. J., Vol. XXIX, No. 10, at 65 (Dec./Jan. 2011); Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 Am. Bankr. L.J. 501 (1993).

Unfortunately, the unsettled questions of law related to Chapter 13 confirmation multiplied with the passage of the Bankruptcy Abuse Prevention and

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pealable order and hence should be treated as a "judgment" within the meaning of Rule 60(b). *Id.* at 269-76.

Consumer Protection Act of 2005 ("BAPCPA"). Pub. L. 109-8, 119 Stat. 23 (2005). Indeed, interpreting the statutory language of the 2005 bankruptcy amendments has been likened to hunting Easter eggs, deciphering a defective Rubik's cube, and imagining impossibilities with the White Queen from Alice in Wonderland.[3] Resolution of unsettled legal questions in Chapter 13, like those created by BAPCPA, should not depend on which party wins the confirmation battle at the bankruptcy court.

The number of unsettled legal issues posed by the Bankruptcy Code, and the importance of their resolution, is illustrated by this Court's own docket, which over the past two decades has regularly featured cases posing important questions of substantive and procedural bankruptcy law—including significant numbers of issues arising under or poten-

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[3] Hon. Keith M. Lundin, *Ten Principles of BAPCPA: Not What Was Advertised*, Am. Bankr. Inst. J., Vol. XXIV, No. 7, at 71 (Sept. 2005) (describing the BAPCPA "Easter egg phenomemon"); *In re Donald*, 343 B.R. 524, 529 (Bankr. E.D.N.C. 2006) ("The amendments are confusing, overlapping, and sometimes self-contradictory. They introduce new and undefined terms that resemble, but are different from, established terms that are well understood. Furthermore, the new provisions address some situations that are unlikely to arise. Deciphering this puzzle is like trying to solve a Rubik's Cube that arrived with a manufacturer's defect."); *In re Trejos*, 352 B.R. 249, 253-54 (Bankr. D. Nev. 2006) ("Making practical sense of this provision, like trying to make sense of much of BAPCPA, requires bankruptcy judges to adopt the approach of the White Queen, and believe in 'as many as six impossible things before breakfast.'").

tially affecting Chapter 13 cases.[4] The flexible approach to defining final, appealable orders reflected in this Court's decisions in *Howard* and *Espinosa* facilitates the timely appellate resolution of such important issues and increases the likelihood that debtors and creditors will be treated evenhandedly under federal bankruptcy law. Appeals from orders denying confirmation, no less than from other similarly final orders in bankruptcy proceedings, can provide the opportunity for needed clarification of the law. *See, e.g., Nobelman v. Am. Sav. Bank*, 508 U.S. 324 (1993).

D. Giving Creditors, But Not Debtors, The Ability to Appeal Decisions Relating To Plan Confirmation Is Unjustified.

Under this Court's approach to finality under section 158, creditors are permitted to appeal orders *granting* plan confirmation. *Espinosa* specifically held that an order confirming debtor's proposed plan is a final judgment, 559 U.S. at 269, even though such an order—like an order *denying* confirmation—does not finally terminate a bankruptcy case. Rather, following plan confirmation, the bankruptcy case continues, with many determinations as to claims yet to be made, and with the possibility of plan revisions or modifications proposed by any par-

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[4] *See, e.g., Harris v. Viegelahn*, No. 14-400 (*cert. granted*, Dec. 12, 2014); *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61 (2011); *Schwab v. Reilly*, 560 U.S. 770 (2010); *Hamilton v. Lanning*, 560 U.S. 505 (2010); *Espinosa*, 559 U.S. 260; *Marrama v. Citizens Bank*, 549 U.S. 365 (2007); *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004); *Assoc. Commercial Corp. v. Rash*, 520 U.S. 953 (1997).

ty, *see Mort Ranta v. Gordon (In re Mort Ranta)*, 721 F.3d 241, 248 (4th Cir. 2013), until the issuance of a discharge order, which reflects the final termination of the case. *Espinosa*'s treatment of confirmation orders as final thus does not reflect that they are somehow different in kind from orders denying confirmation, but rather manifests the flexible and pragmatic approach to finality under section 158 that this Court adopted in *Howard*.

Holding appeals by debtors from denials of plan confirmation to a more stringent standard of finality than appeals by creditors from orders confirming plans systematically disadvantages litigants whom the bankruptcy laws were designed to protect. The late Judge Lumbard, in dissent, succinctly summarized the unfairness of such a rule when the Second Circuit first drew a distinction for appealability purposes between appeals of orders granting confirmation and orders denying confirmation:

> Only the debtor may propose a Chapter 13 plan. ... Therefore the debtor is always the party who seeks to confirm a plan; the creditor is always the party who seeks to deny confirmation. The effect of today's holding is that when creditors lose and a plan is confirmed, creditors may appeal immediately as of right; when debtors lose and a plan is rejected, they may appeal only by leave of the district court. Their only alternative is to wait until a less favorable plan is confirmed, which may be months away, or until the bankruptcy court dismisses the case or dissolves the au-

> tomatic stay, which the debtors will try to postpone for as long as possible. In either event, a bankruptcy court ruling which is final as to a plan of arrangement will be reviewable long after it is made, perhaps long after the plan can be revived. Congress enacted Chapter 13 to aid consumer debtors; we should not delay their access to relief on appeal.

Maiorino v. Branford Sav. Bank, 691 F.2d 89, 95 (2d Cir. 1982) (Lumbard, J., dissenting).

Of course, it is an occasional feature of appellate practice that an order that is appealable if granted is not necessarily subject to appeal if it is denied. But where such disparities exist, they are the result not of preferences for one party over another, but of differences in the consequences of granting and denying the type of order at issue that bear on whether the court's action is truly definitive.

The most obvious example is the granting or denial of summary judgment. In civil litigation. an order granting summary judgment to a party is in many circumstances final and appealable (sometimes depending on whether a Rule 54(b) order is entered), but an order that does no more than *deny* summary judgment generally is not. *See Ortiz v. Jordan*, 131 S. Ct. 884, 891 (2011). But the difference in appealability reflects a fundamental distinction between granting and denying summary judgment: A grant of summary judgment reflects a definitive determination that a party is entitled to judgment as a matter of law, but the denial of summary judgment

is a determination that there is a "'genuine dispute as to [a] material fact' [that] precludes immediate entry of judgment as a matter of law." *Id.* That is, denials of summary judgment leave open the question of who is entitled to prevail on the issues in dispute, and are therefore "by their terms interlocutory." *Id.* (quoting *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 744 (1976)). Granting and denying summary judgment are not symmetrical actions, and thus they not surprisingly are treated differently for purposes of appeal.

Orders granting and denying plan confirmation, by contrast, are equally definitive: They leave nothing remaining to be decided as to the issue posed by the discrete proceeding before the bankruptcy court, which is whether the particular plan proposed by the debtor is subject to confirmation, and they are equally definitive as to critical legal determinations concerning whether key plan terms are legally permissible. Which side wins such a dispute has no logical bearing on whether the determination is a final order in a bankruptcy proceeding.

The circumstances of this case illustrate the peculiar consequences of making appealability turn on which party prevailed on confirmation rather than on the nature of the determination itself. Whether the plan at issue in this case was properly subject to confirmation depends solely on resolution of a disputed legal issue that has divided bankruptcy courts. *Bullard v. Hyde Park Savings Bank*, 752 F.3d 483, 484 (1st Cir. 2014) ("appeal presents an important and unsettled question of bankruptcy law"). The bankruptcy court denied confirmation of the debtor's proposed plan, which included a provision to modify

the mortgage lender's claim by paying the unsecured portion under the plan, and maintaining payments on the secured portion until the claim was paid in full. Other bankruptcy courts across the country have permitted the use of this so-called "hybrid" plan, which combines two permissive claim treatments under chapter 13. 11 U.S.C. §§ 1322(b)(2), 1322(b)(5); *see In re Elibo*, 447 B.R. 359 (Bankr. S.D. Fla. 2011); *In re Kheng*, 202 B.R. 538, 539 (Bankr. D.R.I. 1996); *In re McGregor*, 172 B.R. 718 (Bankr. D. Mass. 1994). After granting leave to appeal, the bankruptcy appellate panel affirmed. The First Circuit held that because the debtor could theoretically, though not realistically, submit a new plan, the decision of the bankruptcy appellate panel was not final. By contrast, if the bankruptcy appellate panel had ruled in the debtor's favor and reversed the bankruptcy court, then its order would undisputably be final, and the First Circuit would have conclusively determined the issue and resolved the split among the lower courts.

Another case that illustrates the disparity well is *Gordon v. Bank of America, N.A., et al. (In re Gordon)*, 743 F.3d 720 (10th Cir. 2014), *pet. for cert. pending*, No. 13-1416 (filed May 21, 2014), which the Court is holding pending its decision in this case. Like this case, *Gordon* involves a question upon which courts across the country, and within the District of Colorado, are divided: Can a plan include a provision requiring a creditor to object to confirmation if it disagrees with the plan's listing of the amount of its claim, on pain of forfeiting its claim for a larger amount if it fails to object? *Compare In re Gordon*, Order Approving Plan Language, No. 10-13885 (Bankr. D. Colo. Mar. 25, 2011) (holding fail-

ure to include plan provision required by local rule, but not inconsistent with the Bankruptcy Code, was lawful, and granting confirmation) *with In re Butcher*, 459 B.R. 115 (Bankr. D. Colo. 2011) (holding the omission of the same plan provision was unlawful and denying confirmation). A creditor, Bank of America, was able to appeal—to the district court, under 28 U.S.C. § 158(a)(1)—the bankruptcy court's confirmation of a plan that included such a provision because confirmation is considered final under section 158. But when the district court held that the plan could *not* be confirmed because of its inclusion of the object-or-forfeit provision, the debtor was not allowed to appeal the very same issue, at the same stage of the case, to the court of appeals.

Differentiating in this manner between appeals at precisely the same stage in bankruptcy proceedings from orders equally final in their consequences to the parties serves no policies incorporated in section 158's finality requirement. Rather, such disparate treatment impedes development of the law and systematically disadvantages one class of litigants in bankruptcy case—debtors.

E. The Alternatives Proposed By Some Courts Do Not Correct The Problem.

The prospect that a debtor might be able to obtain review of an order denying confirmation later, either by appealing a subsequent order confirming another plan or by dismissing the bankruptcy proceedings voluntarily, or accepting an involuntary dismissal, and then appealing, does not correct the imbalance. It is difficult to see why either of those options is preferable, from the standpoint of appel-

late jurisprudence, to recognizing the finality of an order denying plan confirmation. Both possible avenues for appeal involve the debtor appealing an action the debtor has asked the bankruptcy court to take (or has invited by failing to prosecute)—a step that is in tension with normal principles of appellate review—and neither provides a straightforward path to review of an earlier denial of plan confirmation.[5] Although the need to allow some means of appealing denials of confirmation might justify allowing the issue to be raised in such a convoluted way if no alternative were available, a much more straightforward approach would be to recognize the finality of confirmation denials for purposes of section 158.

Moreover, both the possibility of appealing after a later confirmation and the possibility of dismissal pose serious practical obstacles for debtors. Even assuming that developing an acceptable and confirmable alternative plan would be possible—which in some instances it would not be—doing so would take time and involve the expenditure of resources of the parties and the court. That expenditure might well drain the resources of a cash-strapped debtor enough to render financially impossible a meritorious appeal

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[5] An appeal by a debtor from her own later proposed and approved plan is at least apparently at odds with the principle that "a party may not appeal from a judgment or decree in his favor, for the purpose of obtaining a review of findings he deems erroneous which are not necessary to support the decree." *Elec. Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241, 242 (1939). And appeals from voluntary dismissals for purposes of reviewing interlocutory rulings are also disfavored, though sometimes permitted. *See, e.g., Druhan v. Am. Mut. Life*, 166 F.3d 1324 (11th Cir. 1999).

that could have been taken earlier. Even if that did not occur, the activity aimed at confirmation of the unwanted plan would be wasted effort if, after appeal, the denial of confirmation of the earlier plan were overturned and the earlier plan were reinstated.

As for voluntary dismissal,[6] that possibility would require the debtor to surrender a vitally important attribute of bankruptcy proceedings: the protection against demands of creditors outside the bankruptcy process (including the critical protection against foreclosure on the debtor's home) while proceedings are pending. *See* 11 U.S.C. § 362 (automatic stay provision); *see also id.* § 1301(a) (protection against collection of consumer debts from co-debtors). Absent a discretionary stay from the appellate court, that protection would end when the bankruptcy case was dismissed. *Id.* § 362(c)(2)(B). And even if the dismissal permitted immediate refiling of a new bankruptcy proceeding, the automatic stay with respect to the debtor in such a proceeding would be limited to 30 days under 11 U.S.C. § 362(c)(3)(A), because the debtor would have had a prior case dismissed within the preceding year.

In short, other avenues of appeal theoretically available to a debtor denied plan confirmation involve serious practical obstacles to effective review. The important interest in providing fair opportuni-

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[6] While the consequences of voluntary dismissal and dismissal by the court are similar, the debtor's failure to voluntarily dismiss the case also risks an involuntary conversion to Chapter 7. *See* 11 U.S.C. § 1307(c).

ties for debtors as well as creditors to appeal effectively final rulings before the ultimate termination of bankruptcy proceedings would be served by allowing debtors an immediate appeal of orders denying confirmation.

II. Allowing Appeals of Orders Denying Plan Confirmation Would Not Overburden the Courts.

Treating denials of plan confirmation as appealable final orders would not overburden the courts. Chapter 13 debtors generally lack resources to multiply proceedings by taking unnecessary appeals, and they place a high value on obtaining expeditious approval of workable plans that will allow discharge of their debts. Debtors' attorneys are motivated by the same goals, and they rarely are able to devote the resources to an appeal for which they will receive little or no compensation. The experience of several circuits that permit appeal of confirmation denials bears out this economic reality. Courts in these circuits have been able to decide important questions of law related to Chapter 13 plan confirmation, *see, e.g., Mort Ranta*, 721 F.3d at 247-48 (deciding whether Chapter 13 debtors must pay social security benefits to unsecured creditors); *Sikes v. Crager (In re Crager)*, 691 F.3d 671 (5th Cir. 2012) (determining whether minimal distribution to unsecured creditors was bad faith), without experiencing a rush to the appellate courthouse doors.

Appeals are high-cost undertakings for financially distressed debtors. The expense of appealing a bankruptcy court's decision totals thousands, if not tens of thousands, of dollars. The costs of appeals

fall into three general categories: (1) filing fees, (2) costs to prepare the record and briefs, and (3) attorney's fees. Currently, the filing fee to appeal a bankruptcy court's judgment, order or decree is $298.[7] Hundreds more dollars may be spent obtaining transcripts of relevant hearings, and reproducing appellate briefs and appendices. Finally, a competent attorney representing the debtor could spend sixty to seventy hours doing legal research, selecting and reviewing the appellate record, and preparing the debtor's brief and reply brief. At a modest rate of $200 per hour, the attorney fee component could easily exceed $12,000. More time and money would be necessary if oral argument was required. And further appeal to a circuit court would add many more thousands of dollars to the bill.

Chapter 13 debtors tend to be far less affluent than the population as a whole. Although these debtors have regular income—as is required to be eligible for chapter 13—their incomes historically have fallen short of the national average. Data from 1994 and 2007 show that Chapter 13 debtors have income that is thirty to sixty percent less than that of the average American.[8] More recent data indicates that the median of the "average monthly incomes" reported by Chapter 13 debtors in 2013 was

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[7] Administrative Office of U.S. Courts, Bankruptcy Court Miscellaneous Fee Schedule (Dec. 1, 2014), http://www.uscourts.gov/FormsAndFees/Fees/BankruptcyCourtMiscellaneousFeeSchedule.aspx.

[8] Wenli Li, *What Do We Know About Personal Bankruptcy Filings*, Federal Reserve Bank of Philadelphia *Business Review* (Fourth Quarter, 2007).

$3,220 per month, or $38,640 per year.[9] The median household income in the United States for 2013 was $52,250.[10] The costs of an average appeal to the district court or bankruptcy appellate panel (conservatively, $13,000) would consume about one third of the average Chapter 13 debtor's *annual* income. The reality is that cash-strapped, consumer bankruptcy debtors do not generally have funds available to pay fees and costs associated with appellate review.

Moreover, fees for appeals will be on top of fees debtors have already incurred for the filing of the Chapter 13 case and the plan confirmation proceedings in the bankruptcy court. Chapter 13 proceedings are complicated, and if a debtor has any hope of submitting a confirmable plan, assistance of counsel is almost invariably necessary. As a result, pro se filings in Chapter 13 cases are rare. *See* Lois Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 Am. Bankr. Inst. L. Rev. 17, 81 (2012). Legal fees associated with Chapter 13 filings, moreover, have risen significantly—approximately 25%—with the increased requirements imposed on debtors and

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[9] Administrative Office of U.S. Courts, *2013 Report of Statistics Required by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, BAPCPA Table 2D: Income and Expenses Reported by Individual Debtors in Chapter 13 Cases With Predominantly Nonbusiness Debts Commenced the 12-Month period Ending December 31, 2012*, http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BAPCPA/2013/Table2D.pdf.

[10] Amanda Noss, *American Community Survey Briefs, Household Income: 2013*, U.S. Census Bureau (Sept. 2014), http://www.census.gov/content/dam/Census/library/publications/2014/acs/acsbr13-02.pdf

their attorneys by BAPCPA, with the result that mean attorney fees in Chapter 13 cases nationally exceed $2500, and in some states are significantly higher. *See id.* at 30. Such fees are already burdensome for low-income debtors, and greatly diminish the likelihood that they will be able to spend even greater amounts to pursue excessive or unwarranted appeals.

Bankruptcy lawyers likewise have a financial disincentive to take extra appeals. "Lawyers must eat, so generally they won't take cases without a reasonable prospect of getting paid." *Moreno v. City of Sacramento*, 534 F.3d 1106 (9th Cir. 2008) (Kozinski, J.). Given the unlikelihood that typical Chapter 13 debtors will be able to afford the full fees and costs of an appeal, appeals often depend on their attorneys' willingness to handle appeals for little or no compensation. In the experience of NACBA, which works extensively on bankruptcy appellate cases, responsible counsel for Chapter 13 debtors are willing to step forward and undertake appeals if they pose substantial issues that affect many similarly situated debtors and present the opportunity to resolve unsettled questions of law that are important to debtors' ability to reorganize their financial affairs. But they are unlikely to do so lightly or in cases where the prospects of success are low and the issues lack broad significance.

For these reasons, recognizing the appealability of confirmation denials is exceedingly unlikely to overburden appellate courts, and the small numbers of additional appeals that may result are likely to be substantial ones that justify the judicial attention they require. The experience of circuits that consider

orders denying confirmation final bears out this expectation. Although the overall number of bankruptcy filings exceeds the total number of civil and criminal case filings in the federal court system by a factor of about three to one,[11] bankruptcy appeals constitute only a minute portion of the workload of the district courts and courts of appeals. The federal district courts received approximately 2,000 bankruptcy appeals in 2013, out of about 285,000 civil case filings,[12] and the federal courts of appeals and bankruptcy appellate panels combined received fewer than 2,000 bankruptcy appeals, out of over 56,000 appeals overall.[13]

Given the very small number of bankruptcy appeals generally, most of which are from orders whose appealability will be unaffected by the outcome of this case, the marginal increase that would result from recognizing the finality of orders denying plan confirmation is extremely unlikely to overwhelm the

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[11] In 2013, there were 1,107,699 new bankruptcy filings, as compared to 375,870 new civil and criminal case filings in the district courts. *See* Administrative Office of U.S. Courts, *Judicial Business of the United States Courts 2013, Caseload Highlights*, http://www.uscourts.gov/Statistics/JudicialBusiness/2013.aspx.

[12] *See* Administrative Office of U.S. Courts, *Table C-2: U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Periods Ending September 30, 2012 and 2013*, http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/C02Sep13.pdf.

[13] *See* Administrative Office of U.S. Courts, *Judicial Business of the United States Courts 2013, U.S. Courts of Appeals*, Tables 2 & B-1, http://www.uscourts.gov/Statistics/JudicialBusiness/2013/us-courts-of-appeals.aspx.

courts. Indeed, the courts that most clearly recognize the finality of such orders for purposes of appeal—the Fourth and Fifth Circuits—experience very small numbers of bankruptcy appeals, roughly in line with numbers in other circuits. Specifically, the Fourth Circuit received 56 bankruptcy appeals in 2013, the Fifth Circuit 125, and the Third Circuit, which also recognizes the right to appeal at least some confirmation denials, 67. By contrast, the First Circuit had 35, the Second Circuit 84, the Sixth Circuit 56, the Eighth Circuit 41, the Ninth Circuit 273, and the Tenth Circuit 31.[14] The numbers of bankruptcy appeals appear roughly proportionate to the overall caseloads of the respective circuits. As these figures demonstrate, the courts will not be deluged by appeals of confirmation denials.

Moreover, allowing appeals of orders denying plan confirmation would not result in bad faith appeals. Courts can employ traditional judicial tools to address such appeals. For example, parties appealing matters for improper purposes, such as harassment or delay, remain subject to sanctions under Rule 8020 of the Federal Rule of Bankruptcy Procedure. That rule permits a district court hearing an appeal, or a bankruptcy appellate panel, to award damages and costs if it finds that an appeal of an or-

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[14] Administrative Office of U.S. Courts, *Table B-3: U.S. Courts of Appeals—Sources of Appeals and Original Proceedings Commenced, by Circuit, During the 12-Month Periods Ending September 30, 2009 Through 2013*, http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/B03Sep13.pdf. These figures do not include appeals to Bankruptcy Appellate Panels, which exist only in circuits that do *not* allow appeals from confirmation orders.

der, judgment, or decree of a bankruptcy judge is frivolous. Because the majority of such appeals will likely be pursued by counsel, given the rarity of pro se representation in Chapter 13 matters, ethical obligations of attorneys will also deter frivolous appeals.

In short, even if section 158 is properly construed to allow appeals from denials of plan confirmation, bankruptcy appeals will likely remain a disproportionately small part of the workload of the appellate courts. Indeed, the prospect that there will remain too few bankruptcy appeals to allow resolution of the many significant unsettled issues of bankruptcy law is of greater concern than the unlikely specter of a flood of meritless appeals.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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